any "rules of thumb" regarding the value of MDS licenses. Moreover, the Commission has recognized that single round sealed bidding provides bidders no opportunity to pursue back-up strategies, except in the aftermarket, where transaction costs may be high.[75/]

Under these circumstances, sequential oral outcry bidding appears to be the most appropriate methodology for awarding new MDS licenses. The Commission has recognized that, "because simultaneous auctions are more costly and complex to run, we may to [*sic*] choose a sequential auction design when there is little interdependence among individual licenses or groups of licenses."[76/] That is precisely the case here.

Fortunately, the sequential open outcry auction method is adaptable for use when daisy-chains occur. WCAI envisions the Commission conducting two or more auctions among the participants in the daisy-chain, all at the same session. The winner of the first auction would be eligible for processing to grant, and all applications mutually exclusive with the winner's would be dismissed. Any remaining singleton application would be declared eligible for processing to grant, and any remaining applicants in the daisy-chain would participate in a second auction, with the winner declared eligible for processing to grant and those applications mutually-exclusive with the winner's being dismissed. The process would continue until no applications remained.[77/]

[75/]*See id.*

[76/]*Id.* at 2367.

[77/]In the alternative, the Commission could employ sealed bidding to resolve daisy-chains. A system, based on the Private Radio Bureau's successful lottery design for 220-222 MHz (continued...)

C. Having The Commission Predetermine Station Sites Could Prove Problematic.

If the Commission must reject the use of site-specific licensing utilizing a national filing window, WCAI would urge adoption of the Commission's proposal to limit applications to specific sites where an already authorized E, F, or H channel is already authorized.[78] The Commission should recognize, however, that while this approach may be attractive at first blush, it could prove problematic for several reasons.

First, it assumes that existing E, F or H channels are necessarily authorized at an appropriate location for wireless cable service. Unfortunately, history has shown that very few stations are actually constructed where initially proposed. Because so many applications are speculative in number (an infinitesimal number of successful applicants actually construct a wireless cable system -- most either sell or lease to the wireless cable system operator or

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[77](...continued)
local commercial applications, could result in rapid resolution of mutually exclusive applications. In that situation, the Private Radio Bureau used random selection techniques to rank order all of the applicants for 220-222 MHz local commercial applications. The staff then reviewed each application in order, granting any that was not mutually exclusive than a higher ranking granted application. Under WCAI's variant for MDS auctions, the staff would rank order all of the applicants in descending order of bid. The application of the high bidder would be granted. The application of the second highest bidder would then be evaluated to determine whether it is mutually exclusive with the high bidder's: if it is, the second highest bidder's application would be dismissed; if not, the second highest bidder's application would be granted. The application of the third highest bidder would then be evaluated to determine whether it is mutually exclusive with the granted application of any higher bidder: if it is, the third highest bidder's application would be dismissed; if not, the third highest bidder's application would be granted. And so on throughout the chain. In this manner, the Commission can utilize one auction proceeding to award the maximum number of MDS licenses quickly, while assuring that those that value the spectrum most highly secure authorizations.

[78]*See NPRM*, at ¶ 11.

forfeit their license for failure to construct where there is no operator willing to buy or lease the station), few applicants take the time and bear the expense of engineering to determine the optimum site in the marketplace for a wireless cable headend. For the Commission to assume that a given site is appropriate for a system just because someone applied for an E, F or H channel license at that site would be a mistake. Were the Commission to limit applications for new MDS facilities as proposed, it is likely that no stations would actually be constructed (and no service rendered to the public) until the successful applicant could prepare and file, and the Commission could process, a modification application proposing relocation to an appropriate site.

Second, the Commission would have to make subjective decisions regarding the merits of sites in order to avoid authorizing facilities that cannot co-exist due to co-channel interference. Assume a market in which the E channels are at one site, the F channels at another, and the H channels at a third site, all within ten miles of each other. Clearly, the Commission cannot authorize a full complement of MDS channels at each of these three sites, for the resulting co-channel interference will deprive the residents of the market any service whatsoever. Presumably, the Commission would choose one site and limit applications for new MDS stations to that site. However, it would be difficult for the Commission to determine which of the three sites would be most appropriate for use by a wireless cable system. Consideration would have to be given to an applicant's ability to optimize coverage while protecting adjacent markets, the current and future availability of ITFS channels at each of the three sites, tower structural limitations, site rents, availability of space for a headend building and satellite earth stations, among other things. A serious wireless cable system operator will invest dozens of man hours and thousands of dollars to determine the optimum transmission site for a wireless cable system. Obviously, the Commission cannot be expected to do the same. Thus, the Commission would have to select a site based on some simplistic standard (perhaps the site with the most channels) and then accept the delay associated with the almost inevitable post-auction applications to relocate to another site.

Finally, the *NPRM* is silent as to how MDS applications would be filed for those areas where there are no E, F or H channels available. WCAI suggests that, if the Commission does restrict applications for new MDS stations to predetermined sites, it consider using the sites of ITFS stations where there are no E, F or H channel stations authorized.[79/] For areas where there are no stations authorized (and WCAI suspects that those areas will be quite rural), the Commission should use the national filing window approach after it has auctioned off those markets where E, F, H or ITFS channels are authorized.

V. The Commission Should Automate The Application Process To The Greatest Degree Possible And Mandate The Use Of Electronic Filing To Expedite The Processing Of Applications And Facilitate Ready Access To Critical Data.

In the *NPRM*, the Commission has solicited comment on the use of electronic filing processes as a mechanism for expediting the processing of MDS applications once the freeze is lifted.[80/] WCAI wholeheartedly supports the Commission's proposal.

[79/]Where there are ITFS stations at different sites in proximity to one another, the Commission could select the site with the most ITFS channels as the site for new MDS applications.

[80/]*See NPRM*, at ¶¶ 17-21.

As noted above, WCAI recognizes that the site-specific approach it advocates for grouping MDS applications for processing and establishing PSAs is the most complex of the alternatives presented. By the same token, however, WCAI recognizes that the Commission can eliminate much of the complexity associated with a site-specific approach by increasing the degree to which the application process is automated.

Certainly, one of the reasons that the Commission's MDS processing staff historically has been slow to process applications has been the need to manually input the data necessary to conduct interference analyses. By utilizing the proposed electronic application form for new MDS stations and requiring the filing of critical data electronically, the Commission can eliminate that bottleneck.[81/]

Moreover, the Commission's proposal to provide the industry instant access to its database will not only speed FCC staff processing, it will cure a major problem confronting operators and their consulting engineers -- since the application mills flooded the Commission, legitimate wireless cable operators have found their applications often being returned or delayed for failure to analyze previously-proposed stations that were not available for analysis at the time the application was prepared.

The problem was, and still is the lack of a definitive database that can be relied upon by system developers and the staff to determine with precision the status of the MDS channels in a given market. While the Private Radio Bureau made strides towards developing such a

[81/]The specific data elements the Commission proposes for inclusion in the electronic application form appear to be appropriate.

database during the pendency of PR Docket No. 92-80, the current MDS inventory is unreliable and incomplete. Certainly, one of the reasons many applications have been returned by the Commission is that in the absence of a definitive database, applicants are forced to design stations without being able to determine who, if anyone, is entitled to protection. Applicants are being asked to fly blind; they are required to protect from harmful interference facilities that they cannot possibly know have been proposed. By providing an accurate database of MDS licenses and pending applications before lifting the filing freeze, the Commission can reduce the number of applications that are defective due to a lack of knowledge of prior proposals. This will not only aid applicants but also reduce the staff's need to process applications that will ultimately be found as defective.

No doubt, some will complain about the cost of electronic filing. While WCAI urges the Commission to do what it can to simplify electronic filing and to minimize the cost, the Commission ultimately must turn a deaf ear towards those complaints. The costs associated with the implementation of electronic filing are minuscule in comparison to the benefits the public will achieve by more rapid introduction of wireless cable service. No legitimate applicant should oppose a cost of several hundred dollars when the benefit, expedited processing of applications, is so great. Moreover, the Commission should not exempt ITFS applications from the electronic filing program. The anticipated costs of electronic filing ($300) are small compared to the costs of constructing and operating an ITFS station. The minor fee associated with electronic filing is a small price for anyone to pay for more rapid access to MDS or ITFS spectrum. Yet, the entire electronic filing system would be compromised were some or all ITFS licensees exempted, for then the Commission's database would no longer be definitive.

The *NPRM* proposes several steps to standardize the process by which interference calculations are made.[82] WCAI supports the Commission's proposals, with one caveat. The proposal advanced in Paragraph 15 of the *NPRM* to require proposed facilities to demonstrate compliance with the 45 dB and 0 dB D/U ratios only at points along the PSA contour could prove problematic when terrain shielding protects the contour of the PSA, but not internal points.[83] To avoid this problem, the Commission should mandate that where terrain shielding is relied upon to demonstrate compliance with the interference protection ratio at the border, an analysis be conducted of the potential for interference along the given radial at the point farthest from the desired station that is not terrain shielded, if any.

Finally, WCAI does not oppose the Commission's proposal to use electronic fee payments for new MDS applications, so long as current methods (check, bank draft, money order, wire transfer, and credit card) also remain available.

VI. The Commission Must Adopt Rules To Govern Competitive Bidding That Expedite The Initiation Of Wireless Cable Service To The Public.

A. The Commission Should Require All MDS Applicants To Submit A Significant Upfront Payment In Order To Participate In An Auction.

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[82] *See NPRM*, at ¶ 15.

[83] Although not addressed in the *NPRM*, the Commission should specify number of points along the PSA contour and location of those points relative to the undesired station. WCAI is in the process of polling consulting engineers active in the wireless cable industry for suggestions regarding this issue, and intends to submit the results in its reply comments.

In light of the recent history of abuse of the MDS application process, WCAI believes the Commission must be as vigilant as possible to assure that only serious, qualified bidders participate in MDS auctions. In its *Second Report and Order* in PP Docket No. 93-253, the Commission found that "some form of upfront payment is necessary to deter frivolous or insincere bidding."[84] Since then, the Commission has required upfront payments of all auction participants, and should continue to do so with respect to MDS applicants.

The Commission has recognized that "in determining the amount of upfront payment required, we are balancing the goal of encouraging bidders to submit serious, qualified bids with the desire to simplify the bidding process and minimize implementation costs that will be imposed on bidders."[85] The appropriate amount of the upfront payment, in WCAI's view, will depend upon rights the Commission intends to provide the winning bidder.

As a general proposition, the Commission has determined that the upfront payment should be equal to $0.02 per pop per MHz for the largest combination of MHz-pops the bidder anticipates bidding on in any single round of bidding.[86] If, despite WCAI's contrary entreaties, the Commission elects to award licenses with PSAs co-terminus with geographic boundaries, there is no apparent reason to depart from that rule, for the data necessary to calculate upfront payments will be readily available.

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[84] *Auction Second Report and Order*, 9 FCC Rcd at 2378.

[85] *Id.*

[86] *See id.*

However, that approach will prove difficult to apply if, as WCAI suggests, the Commission retains site-specific licensing. Under a site-specific system, it will be virtually impossible to determine the population of the PSA of the proposed station, since the PSA boundary will not correspond to any census tracts. Therefore, WCAI suggests that the Commission employ a two-tiered system of flat-fee upfront payments. Specifically, WCAI proposes that for applications proposing stations in or within fifteen mile of an MSA, an upfront payment of $25,000 per channel should be required. For applications proposing to locate new MDS stations more than fifteen miles outside an MSA, the upfront payment should be reduced to $5,000 per channel. While these amounts are in excess of the $2,500 minimum established in the *Auction Second Report and Order* and employed for the IVDS auctions, the Commission's experience with defaults by IVDS winning bidders shows that a $2,500 upfront payment is insufficient to assure the seriousness of the applicant and the recovery of penalties against defaulting bidders.

B. The Commission Should Require 20% Downpayments From Winning Bidders Before Closing An Auction.

In the *Auction Second Report and Order*, the Commission recognized that "to provide further assurance to the Commission that the winning bidder will be able to pay the full amount of its winning bid, the bidder must tender a significant and non-refundable down payment on the license to the Commission over and above its upfront payment before the auction is terminated."[87] WCAI sees no reason to depart from that approach here, particularly

[87] *Id.*, at 2381.

given the history of abuse in the MDS application process. As a general rule, the Commission has determined that its goal of deterring defaults can be accomplished by requiring that a winning bidder supplement its downpayment so that the Commission will have on deposit an amount equal to 20 percent of the winning bid within five business days after the auction is over.[88] As will be discussed below, WCAI supports permitting designated entities to make payments under an installment plan.[89] When installment plans are available, the beneficiary is generally only required to bring its downpayment to 10 percent after the bidding, with another 10 percent due upon license issuance.[90]

Application of these general approaches to the MDS licensing system would appear to be appropriate, except where the auction involves daisy-chain applications. As discussed above, WCAI believes the Commission should employ two or more sequential open outcry auctions to resolve daisy-chains. To minimize the inconvenience to the Commission and the parties, those auctions should be conducted during the same auction session. Before proceeding to a second auction, in which the winner of the first auction and those mutually-exclusive with the winner are excluded, the Commission must make certain that the winner not default. Therefore, where daisy-chains are involved, the Commission should require a 20

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[88] *See id.* As the Commission has done with other services, it should provide that if the upfront payment already tendered by a winning bidder, after applying any bid withdrawal penalties, amounts to more than 20 percent of its winning bid, no additional deposit should be required. *See id.* at note 144.

[89] *See infra* at Section VII.B.

[90] *See Auction Second Report and Order*, 9 FCC Rcd at 2381 n. 145.

percent downpayment from designated entities and payment in full from all other auction winners to assure that there is no default and that those mutually-exclusive with the auction winner are not unfairly excluded from the auction process.

C. The Commission Should Impose Severe Penalties Against Defaulting Bidders.

In the *Auction Second Report and Order,* the Commission recognized the need to deter bidders from defaulting after an auction is closed.[91] WCAI is concerned that, if strong deterrents to frivolous applications are not implemented, defaulting bidders could delay the licensing process and hinder the Commission's goal of promoting wireless cable as effective competition to wired cable.

The Commission has recognized that allowing bidders to withdraw bids without ever paying a penalty would encourage insincere bidding.[92] In the *Auction Second Report and Order*, the Commission noted that "[i]nsincere bidding, whether purely frivolous or strategic, distorts the price information generated by the auction process and reduces its efficiency."[93] The Commission's experience with defaults by IVDS winning bidders shows that defaults after the close of an auction are a very real possibility. Such defaults certainly pose a threat to the prompt delivery of wireless cable service to the public. If a high bidder defaults after

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[91] *See id.,* at 2373-75.

[92] *See id.,* at 2373. In the *Auction Second Report and Order*, the Commission indicated that it may choose not to adopt any penalty for bid withdrawal in the course of an oral outcry auction because the possibility of distorting price information is low and the probability of mistaken bids is greater. *See Auction Second Report and Order*, 9 FCC Rcd at 2374. WCAI agrees with this rationale, and supports default penalties only for post-auction defaults.

[93] *Id.*

the auction closes, additional time will be required to re-auction or otherwise assign the license.

In the *Auction Second Report and Order,* the Commission established a general penalty for post-auction defaults requiring the defaulting party to pay the difference between the withdrawn high bid and the next highest bid plus an additional penalty equal to three percent of the amount of the winning bid the next time the license is offered by the Commission, or three percent of the amount of the defaulting bidder's bid, whichever is less.[94] WCAI strongly endorses the implementation of an after-auction default penalty, such as the one adopted in the *Auction Second Report and Order,* and believes that these penalties will adequately discourage defaults ensure that bidders have adequate financing and that they meet all eligibility and qualification requirements.

VII. THE COMMISSION SHOULD ADOPT RULES THAT ADVANCE THE PARTICIPATION OF DESIGNATED ENTITIES IN THE WIRELESS CABLE BUSINESS, WHILE ASSURING THAT NON-DESIGNATED ENTITIES ALSO HAVE A FAIR OPPORTUNITY TO PARTICIPATE.

In authorizing the Commission to employ competitive bidding procedures to select from among mutually exclusive applicants, Congress mandated that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures . . . ."[95] While WCAI believes that some of the tools

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[94] *See id.,* at 2374.

[95] 47 U.S.C. § 309(j)(4)(D).

employed by the Commission to benefit designated entities may be inappropriate for MDS, WCAI strongly supports the use of tax certificates, installment payments and, where appropriate, bidding credits to promote the participation of small businesses and businesses owned by women and minorities in the wireless cable industry.[96]

A. Tax Certificates Will Provide An Effective Mechanism For Promoting Participation By Businesses Owned By Minorities and Women.

In the *Auction Second Report and Order*, the Commission observed that tax certificates could be useful as a means of attracting investors to designated entities and to encourage non-designated entities to assign licenses to designated entities in post-auction transactions.[97] In WCAI's view, the use of tax certificates would be particularly appropriate here, both as a tool to assist minority- and women-owned businesses to attract start-up capital and as a mechanism for promoting acquisition of wireless cable systems by such businesses in post-auction sales.

The Commission has employed tax certificates over the years to promote investment in minority controlled broadcast stations and cable television systems and to encourage owners of such stations and systems to sell their facilities to minority-owned businesses.[98] Recently,

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[96] It should be noted that women and minorities have long enjoyed preferential entree into the wireless cable industry. The vast majority of MDS channels ever licensed were awarded through lotteries in which women and minorities were awarded significant preferences.

[97] *See Auction Second Report and Order*, 9 FCC Rcd at 2393.

[98] *See, e.g. Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849 (1982); *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978).

the Commission determined that it could promote the participation of minority- and women-owned entities in the IVDS, narrowband PCS and broadband PCS by awarding tax certificates upon request to an initial investor in a minority- and women-owned business who either provides start-up financing that allows a minority- or women-owned business to acquire licenses at auction or in the aftermarket, or who acquires an interest within the first year after license issuance in exchange for financing that stabilizes a designated entity's capital base.[99] These tax certificates permit their holders to defer the gain realized upon a sale either by: (1) treating it as an involuntary conversion under 26 U.S.C. § 1033 with the recognition of gain avoided by the acquisition of qualified replacement property; or (2) electing to reduce the basis of certain depreciable property, or both.[100] WCAI believes that a similar tax certificate program would enhance the ability of minorities and women to participate in the wireless cable industry.

In implementing a tax certificate program for MDS, the Commission should impose the same restrictions it has employed in crafting the IVDS, narrowband PCS and broadband PCS programs. Tax certificates should only be available to an investor in a minority- or women-owned or controlled business when the sale of that investor's interest does not reduce

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[99] *See* 47 C.F.R. § 95.816(d)(2); 47 C.F.R. § 24.309(c); and 47 C.F.R. § 24.713 (a), (b).

[100] *See Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 9 FCC Rcd 2941, 1977 (1994)[hereinafter cited as "*Auction Third Report and Order*"]; *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, FCC 94-99, PP Docket No. 93-253, at ¶ 50-51 (rel. May 10, 1994)[hereinafter cited as "*Auction Fourth Report and Order*]; *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 9 FCC Rcd 5532, 5595-96 (1994)[hereinafter cited as "*Auction Fifth Report and Order*"].

the minority or female ownership or control below 50.1%.[101] With regard to the investor tax certificate program, the entity in which the investment is made should be required to satisfy the definition of a minority- or female-owned entity set forth in the *Second Report and Order* at the time of the original investment as well as after the investor's shares are sold. For aftermarket sales, tax certificates should be issued only to entities that meet the definition at the time of sale.[102] Finally, to deter sham transactions, the Commission should impose a one-year holding requirement on the transfer or assignment of MDS licenses obtained through the benefit of tax certificates.[103]

B. Designated Entities Should Be Entitled To Make Installment Payments On Winning Bids.

In addition to employing tax certificates as a mechanism for promoting greater participation by designated entities in the wireless cable industry, the Commission should permit designated entities that submit winning bids to make installment payments. As the Commission has recognized, installment payments provide "an effective way to promote the participation of designated entities in the provision of spectrum-based services.[104]

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[101] *See Auction Third Report and Order*, 9 FCC Rcd at 2978; *Auction Fourth Report and Order*, FCC 94-99, at ¶ 51; *Auction Fifth Report and Order*, 9 FCC Rcd at 5596.

[102] *See Auction Third Report and Order*, 9 FCC Rcd at 2979; *Auction Fourth Report and Order*, FCC 94-99, at ¶ 52; *Auction Fifth Report and Order*, 9 FCC Rcd at 5596.

[103] As with IVDS, narrowband PCS and broadband PCS, while the holding period should not apply to assignments or transfers to qualified minority- or female-owned businesses, assignees and transferee obtaining MDS licenses pursuant to such exception should be subject to the one-year holding requirement. *See id.*

[104] *Auction Fourth Report and Order*, at ¶ 53.

As noted above, WCAI believes that all winning bidders should be required to submit a 20 percent downpayment following any MDS auction as a mechanism for deterring defaults.[105/] In the case of designated entities, WCAI has proposed that a 10 percent downpayment be on deposit within five days of the close of the auction, with the remainder on deposit within five days of license issuance.[106/] In addition, WCAI believes that the Commission's goal of promoting increased participation by designated entities can be promoted by permitting designated entities to pay the remaining 80 percent balance of their winning bid in installment payments over ten years.[107/] As with installment payments for narrowband PCS[108/] and relatively small bidders in broadband PCS,[109/] the general interest rate should be equal to the rate of a ten-year Treasury note plus 2.5%. WCAI also recommends

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[105/] *See supra* at Section VI.B.

[106/] Such a payment schedule is consistent with the general rule set out in the *Second Report and Order*. *Auction Second Report and Order*, 9 FCC Rcd at 2390. This general rule was followed for the IVDS, narrowband PCS and broadband PCS. *See Auction Third Report and Order*, 9 FCC Rcd at 2978; *Auction Fourth Report and Order*, at ¶ 54; *Auction Fifth Report and Order*, 9 FCC Rcd at 5592.

[107/] Although the Commission generally permits installment payments to be spread over the term of the license, that approach would be inequitable here, since all MDS licenses expire on a single date, regardless of when issued. The next such date is May 1, 2001. So that all designated entities will be treated similarly, regardless of when any particular license is issued, MDS installment payments should be spread over ten years -- the maximum term for which an MDS license can be issued.

[108/] *See Auction Fourth Report and Order*, at ¶ 95.

[109/] 47 C.F.R. §24.711(b)(2).

that the Commission set an interest rate for designated entities equal to the rate of a ten-year Treasury note without additional interest.[110]

Designated entities should also be afforded the benefit of making interest-only payments in the early years of the license term. As the Commission has done for winners of broadband PCS entrepreneurs' blocks: (i) small businesses should be permitted to make interest-only payments for the first two years; (ii) minority- or women-owned entities should be given the opportunity to make interest-only payments over the first three years of the payment period; and (iii) businesses that are both small and women- or minority-owned should be allowed to pay interest only for the first six years.[111]

Strict attribution rules should be promulgated to ensure that designated entities remain in clear control of MDS licenses subject to installment payments, while still retaining the ability to attract passive investment. The attribution rules drafted for broadband PCS provide an excellent model and should be employed by the Commission for MDS.[112]

In the *NPRM*, the Commission has solicited comment on whether the standard definition of "small business" utilized by the Small Business Administration ("SBA") is

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[110] This interest rate is consistent with the rate established for designated entities in the *Second Report and Order*. *See Auction Second Report and Order*, 9 FCC Rcd at 2390 and 47 C.F.R. § 1.2110(d)(3)(i). This rate has also been used for designated entities in the IVDS, narrowband PCS and broadband PCS auctions. *See Auction Third Report and Order*, 9 FCC Rcd at 2978; *Auction Fourth Report and Order*, at note 90; *Auction Fifth Report and Order*, 9 FCC Rcd at 5592.

[111] 47 C.F.R. §24.711(b).

[112] *See* 47 C.F.R. §24.720(j) - (l).

appropriate for MDS, or whether the Commission should do as it did for broadband and narrowband PCS and award designated entity status to any business with average gross revenues for the three years proceeding the auction of $40 million or less.[113] WCAI submits that the approach adopted by the Commission for PCS is appropriate for the MDS.

The Commission has consistently acknowledged that the SBA's small business definition is inappropriate for use in capital intensive industries.[114] The Commission has recognized that the SBA standard "is overly restrictive because it would exclude most businesses possessing the financial resources to compete successfully in the provision [of capital intensive services]."[115] Thus, the costs of system construction have been the determining factor in establishing the small business definition for each service.[116]

The Commission's approach to defining "small business" for narrowband and broadband PCS strongly suggests that the Commission define "small business" for purposes

[113] *See NPRM*, at ¶ 24.

[114] *See Auction Second Report and Order*, 9 FCC Rcd at 2395-96; *Implementation of Section 309(j) of the Communications Act - Competitive Bidding Narrowband PCS and Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services*, FCC 94-219, PP Docket No. 93-253 at ¶ 42-46 (rel. Aug. 17, 1994)[hereinafter cited as "*Auction Third Memorandum Opinion and Order*"]; *Auction Fifth Report and Order*, 9 FCC Rcd at 5606-08.

[115] *Auction Third Memorandum and Order*, at ¶ 44; *Auction Fifth Report and Order*, 9 FCC Rcd at 5608.

[116] *See, e.g., id*: *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, FCC 94-271, PR Docket No. 93-144 at ¶ 99 (rel. Nov. 4, 1994).

of MDS as any business with average gross revenues for the three years proceeding the auction of $40 million or less.[117] The Commission has estimated that the cost to construct a narrowband PCS system can be as low as approximately $50,000 for a Basic Trading Area system.[118] Construction costs for a narrowband Major Trading Area system are estimated to be $100,00 to meet the minimum population requirements and $1.25 million to eventually meet the minimum geographical requirements.[119] Based on these cost estimates, the Commission has found that a $40 million gross revenues benchmark will avoid excluding most businesses possessing the financial resources to compete successfully in the provision of narrowband and broadband PCS services.[120]

The *NPRM* is incorrect when it implies that the capital requirements for MDS operators are more modest than those imposed on narrowband PCS system operators.[121] To the contrary, a wireless cable operator likely will expend far more capital in order to develop a competitive system. Although wireless cable technology is significantly less expensive to deploy than traditional coaxial cable, it is not inexpensive.[122] The initial cost of starting a

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[117] *See Auction Third Memorandum Opinion and Order*, at ¶ 46; *Auction Fifth Report and Order*, 9 FCC Rcd at 5608-09.

[118] *Auction Third Report and Order*, 9 FCC Rcd at 2969 N.40.

[119] *Id.*

[120] *See Auction Third Memorandum Opinion and Order*, at ¶¶ 44-46; *Auction Fifth Report and Order*, 9 FCC Rcd at 5600.

[121] *See NPRM,* at n. 20.

[122] *See* Lee, "Wireless Cable-Television Sector Is on Acquisition Binge," *Wall St. J.* (June 8, 1994).

system, before adding the first subscriber, can range from just under $1 million for a small, relatively unsophisticated rural system, to several million dollars for a state-of-the-art major market facility. Although the marginal cost of adding a subscriber will vary from system to system depending upon the sophistication of the technology employed, marketing expenses and other variables, it generally runs in the neighborhood of $400-600. Thus, it takes substantial capital to develop any significant subscriber base.

Because of the capital requirements for wireless cable, use of the SBA's definition would exclude those companies with the financial wherewithal to actually construct and operate wireless cable systems. Therefore, adoption of a $40 million gross revenues standard is more appropriate under these circumstances.

C. Bidding Credits Are An Appropriate Mechanism For Promoting Involvement In Wireless Cable By Designated Entities Where A Designated Entity Has Access To The Critical Mass of Channels Necessary To Develop A Viable Business.

Another tool the Commission has reserved for promoting participation by designated entities in auctions is to offer a bidding credit where appropriate.[123/] WCAI believes that a 25 percent bidding credit is an appropriate mechanism for promoting involvement in wireless cable by designated entities, so long as the designated entity gaining the benefit of the credit has access to the critical mass of channels necessary to develop a viable wireless cable business.

Once again, the Commission's goal in this proceeding is to expedite the introduction of wireless cable service to the public by those able to accumulate the critical mass of

[123/] *See Auction Second Report and Order*, 9 FCC Rcd at 2388.

channels necessary to compete effectively with cable. As WCAI discussed above in Section III, it believes that for a wireless cable system to be viable, an operator must have access to at least twenty channels, although systems with as few as twelve channels may be viable in rural areas. While WCAI appreciates the Commission's desire to promote participation by designated entities in the wireless cable business, it would be inconsistent with the goal of this proceeding to afford bidding credits to those designated entities that do not have access to sufficient channel capacity to provide a viable service.

Therefore, WCAI suggests that bidding credits be restricted to applicants proposing to locate new MDS stations in an MSA or within fifteen miles of the boundary of a MSA that demonstrate that the number of channels being applied for, coupled with the number of channels that applicant already has under its programming control at the proposed station site, equals at least twenty. Applicants proposing to locate new MDS stations more than fifteen miles beyond the boundary of the nearest MSA should be required to demonstrate that the number of channels being applied for, coupled with the number of channels that applicant already has under its programming control at the proposed station site, equals at least twelve.

D. Spectrum Set-Asides Are Inappropriate For Services Where, As Here, There Is Only Spectrum For One Service Provider.

In the *Auction Second Report and Order*, the Commission reserved the ability to set aside spectrum for bidding only by designated entities under appropriate circumstances.[124] The present circumstances, however, are inappropriate for the use of spectrum set-asides.

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[124] *Auction Second Report and Order*, 9 FCC Rcd at 2392.

Of all the services where auctions have been employed, MDS is unique in at least one respect -- all of the available channels must be aggregated under common control for a wireless cable operator to offer a viable alternative to coaxial cable.[125/] Yet, the inability of wireless cable operators to consolidate channels has been one of the primary reasons why wireless cable has been slow to emerge as a viable competitor in the multichannel video distribution marketplace.[126/] By proposing to auction all available MDS channels in a market as a package, the *NPRM* makes a frontal assault against this problem.[127/] Setting aside certain channels for licensing exclusively to designated entities would merely balkanize the spectrum, further delaying the launch of new wireless cable systems.

Because, as a practical matter, there can be but one wireless cable operator in a market, an MDS spectrum set-aside for the benefit of designated entities would be inappropriate. Significantly, the Commission already has determined where there will be as few as two service providers in a market, it will refrain from setting aside one channel group

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[125/] *Amendment to Part 74 of the Commission's Rules Governing the Use of the Frequencies in the Instructional Television Fixed Service*, 9 FCC Rcd 3360, 3364 (1994).

[126/] *See supra* note 17, 46.

[127/] *See NPRM*, at ¶ 7.

for designated entities.[128] Logic dictates that the same should hold true where there will be but one service provider.

VIII. CONCLUSION.

In sum, the Commission is to be applauded for moving towards adoption of the competitive bidding rules that must be in place before the freeze on applications for new MDS stations can be lifted. By taking care to protect the interest of incumbents, to promote the accumulation of critical masses of channels, and to accommodate the realities of wireless

[128] *See Auction Fourth Report and Order*, at ¶ 37; *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 8 FCC Rcd at 7647 n. 50. Similarly, in the *Fifth Memorandum Opinion and Order* in PP Docket No. 93-523, the Commission refused to designate one half of the available PCS spectrum as being entrepreneur's blocks. *See Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, FCC 94-285, at ¶ 14 (rel. Nov. 23, 1994).

cable technology, the Commission can assure that wireless cable continues to expand as viable competition to cable.

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